SHAW & SHAW LTD. v. LIM HOCK KIM (No. 2)

[A. C. J. (Whyatt C.J.) June 20, 1958]

[Singapore — District Court Appeal No. 24 of 1955]

Advocate and Solicitor — Duties and obligations of an advocate.

The guiding principle laid down by Judges of great learning and wisdom as to the conduct of an advocate are that while an advocate should be fearless in carrying out the interest of his client, he is, as an officer of the Court under an obligation of frankness and candour founding that confidence reposed by the Bench in the Bar. He is also under obligation to be careful to display accuracy in his presentation of facts and it is his duty to call the attention of the Court to any case or statute which is clearly against him. He wields the arms of a warrior and not of the assassin.

DISTRICT COURT APPEAL.

K. A. Seth for the plaintiffs-appellants.

C. H. Smith for the defendant-respondent.

The facts and arguments appear sufficiently from the judgment.

Whyatt C.J. : — On the 5th March 1958 the Court granted a stay of execution in this case for a period of three months to enable the defendant to apply to the Privy Council for Special Leave to appeal and a few days before the expiry of the three month period the defendant applied for an extension of the stay for a further period of six weeks. The application was heard by me on the 2nd June and was adjourned to enable the defendant to comply with the Court's request that it be fully informed concerning the steps which had been taken to prosecute the application to the Privy Council during the months of March and April as to which the defendant's affidavit was completely silent. At the adjourned hearing on the 4th June, after considering the information relating to March and April and the submissions of counsel, I ordered that the stay be extended for a further period of approximately three weeks until the 30th June but in view of certain unusual features in these proceedings, I stated that I would give a written judgment in this case.

This action was commenced in the Civil District Court as long ago as the 7th October 1954. It was a claim for possession of certain controlled premises in Balestier Road on the ground *inter alia*, that the buildings were of a temporary character and the plaintiffs (who were the landlords) desired to erect permanent buildings on the site. The learned Civil District Judge dismissed the claim in April 1955 and the plaintiffs filed a petition of appeal to the High Court in September 1955. For some reason which does not clearly appear from the record, the appeal was not brought on for hearing until the 5th March 1958 when the decision of the learned Civil District Judge was reversed* and the plaintiffs obtained an order for possession and *mesne profits*. The defendant applied for leave to appeal to the Privy Council but the application was refused on the ground that the decision was limited to the particular facts of this case; a stay of execution was however granted for three months to enable the defendant to apply to the Privy Council for special leave to appeal. Six days before the expiry of three month period, namely, on the 29th May, the defendant gave notice of the present motion, asking for an extension for a further period of six weeks.

The motion was supported by an affidavit by a managing clerk in the service of the defendant's solicitors, which exhibited a letter dated the 19th May from London solicitors to the defendant's solicitors, in which it was stated that counsel had had the papers for the preparation of the draft petition for some days and that he was somewhat pressed with urgent work but it was hoped to send the petition to the defendant's solicitors for approval by the end of the week. The affidavit stated in paragraph 3 that the deponent verily believed that "Counsel who has been instructed to approve the petition for special leave to appeal and who will appear on the petition has been pressed with urgent work which accounts for the delay which has occurred in filing the said petition". An affidavit was filed in reply by the manager of the plaintiff company and in it he pointed out, first, that the affidavit of the defendant's solicitors' managing clerk contained no reference to the date when the London solicitors received instructions concerning the filing of the petition, and secondly, it did not satisfactorily account for an interval of ten weeks between the 5th March and the 15th May on which date the defendant's solicitors first wrote to the plaintiffs' solicitors indicating that it might be necessary to apply for an extension of the stay. In other words although it was incumbent upon the defendant to satisfy the Court that the proposed application to the Privy Council for Special Leave had been prosecuted with due diligence during the period of the stay, the affidavit in support of the motion was completely silent as to the first ten weeks of the three month period.

Such was the evidence before the Court when the motion came on for hearing on the 2nd June. Counsel for the defendant read the affidavit of his managing clerk and then cited certain authorities relating to the practice of the Courts in granting or refusing a stay of execution but omitted to refer to the period of ten weeks which the plaintiffs had complained was not satisfactorily accounted for. The Court, therefore, drew counsel's attention to this omission whereupon counsel stated that he thought counsel for the plaintiffs

* *ante* p. 118.

knew the reason or a large part of it. Counsel went on to explain that he had applied to counsel for the plaintiffs some time ago for the documents in this case in order to make copies because unfortunately the documents which the defendant's solicitors had sent to London went, by some error, by sea mail instead of air mail. At a later stage counsel for the defendant corrected his statement that the documents had been sent to London in error by sea mail and informed the Court that what had happened was that the documents had been sent to London for an opinion but somebody in his office did not ask the London solicitors to send them back by air mail and in fact they had come back by sea mail. Plaintiffs' counsel's recollection of the matter was that he was asked by counsel for the defendant to make certain documents available for copying because, as he understood him to say then, "something had gone astray". It was at this stage of the proceedings that I adjourned the hearing so that counsel for the defendant could file a supplementary affidavit, explaining what occurred and how it occurred during the first two months of the stay.

At the adjourned hearing, counsel for the defendant read a further affidavit by his managing clerk. In this affidavit it was explained that the defendant's solicitors wrote to one of their London agents on the 6th March requesting them to obtain counsel's opinion as to the prospects of success on appeal and on the 21st March they received the opinion. On the same day, the defendant's solicitors, overlooking the fact that the defendant might wish to obtain a second opinion, wrote to their London agents and expressly requested them to return the papers by sea mail. Subsequently the defendant instructed his solicitors to obtain a second opinion and the defendant's solicitors telegraphed to their London agents on the 25th March to prevent the papers being returned by sea mail but they had already been despatched. It was in these circumstances that the defendant's solicitors borrowed documents from the plaintiffs' solicitors in order to make copies for the purpose of obtaining a second opinion. On the 1st April the defendant's solicitors wrote to different London agents requesting them to obtain fresh counsel's opinion as to the prospects of success and on the 30th April they received a telegram informing them of counsel's advice. A few days later, on the 6th May, the defendant's solicitors telegraphed instructions to their London agents requesting them to proceed forthwith with the preparation of the petition and on the 30th May, the petition was actually filed. Thus it will be seen that, broadly speaking, the three month period of the stay was taken up as to the month of March in obtaining the first counsel's opinion, as to the month of April in obtaining the second counsel's opinion, and as to the month of May in drafting and filing the petition. The statement, therefore, in the original affidavit in support of the motion that counsel who had been instructed to approve the petition had been pressed with urgent work "which accounts for the delay which has occurred in filing the said petition" was only part of the reason for the delay and standing by itself, it conveyed an impression of lack of candour.

As it turned out, the Court was not called upon to decide whether the defendant had proceeded with due diligence because during the adjournment, plaintiffs' counsel had discussions with his client and as a result, he informed the Court at the adjourned hearing that while the plaintiffs did not consent to an extension of the stay, they would leave the matter to the Court. They suggested however that if an extension were granted, it should be limited to the 30th June by which date it was expected the petition to the Privy Council would have been heard. Accordingly I granted a stay until the 30th June and in the event of special leave being granted, a further stay until the disposal of the appeal and ordered the defendant to pay the costs of the motion.

I would add that the difficulty in dealing with this application has been due almost entirely to the fact that when the motion was originally before the Court, there was a curtain of silence across the first two months of the period of the stay. It is unfortunate that the further information provided in the supplementary affidavit was not placed before the Court in the first instance. If it had been available at the first day's hearing, counsel for the defendant would not have had to supplement the original affidavit of the managing clerk by statements from the Bar, relying upon his recollection with all the difficulties attendant upon speaking from memory, and there would have been no necessity for an adjournment as the Court would have been adequately informed from the outset. Counsel for the defendant offered his apologies if he had in any way misled the Court and assured the Court most emphatically that there was never any intention of doing so. I need hardly say the Court accepts without qualification counsel's apologies and assurances in this matter.

The Court appreciates fully the difficulties which confront counsel from time to time in the discharge of their dual duty to their clients and to the Court, and it may be of assistance to them in the solution of such difficulties when they arise, to recall the guiding principles laid down in this matter by Judges of great learning and wisdom. Of the duty of an advocate to his client, it will suffice to quote the eloquent language

of Chief Justice Cockburn cited by McCardie J. in an address delivered in the Middle Temple :—

"My noble and learned friend Lord Brougham, . . . said that an advocate should be fearless in carrying out the interests of his client, but I couple that with this qualification and this restriction, that the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interests of his clients *per fas* and not *per nefas*. It is his duty to the utmost of his power to seek to reconcile the interests he is bound to maintain and the duty it is incumbent upon him to discharge with the eternal and immutable interests of truth and justice".

The advocate's duty to the Court is perhaps more difficult to define but it has nevertheless been well expressed by an eminent Law Lord, Lord Tomlin in an address to the Canadian Bar Association in these words :—

"There is, besides, the advocate's obligation to the Court owed by reason of his being engaged in assisting the Court properly to perform its functions. It is an obligation of frankness and candour founding that confidence reposed by the Bench in the Bar which is the most effective of all accelerators of the quick flow of justice. By virtue of this obligation the advocate must with regard to facts be careful to display accuracy in his description of the materials before the Court, while presenting them in the light which seems to him most favourable to his client.

The advocate's obligation of disclosure in matters of law has not always been so clear. At any rate it can, I think, be said today that it is the duty of the advocate to call the attention of the court to any case or statute which is clearly against him. This doctrine has recently received support from the words of a distinguished member of the House of Lords. It satisfies conscience and is in accordance with the view of the advocate's position which I have already indicated."

These, then, are the two principles laid down by Chief Justice Cockburn and Lord Tomlin for the assistance of both the Bench and the Bar in dealing with the problems which arise from the double aspect of an advocate's duty; they are indeed two lamps of advocacy which both illuminate the difficulties and at the same time provide a safe and sure guide to their solution.

Order accordingly.

Solicitors : *Sisson & Delay; Donaldson & Burkinshaw.*

YEE CHANG & CO. LTD. v. N.V. KONINKLIJKE PAKETVAART MAATSCHAPPIJ

[O. C. J. (Whyatt C.J.) June 20, 1958]

[Singapore — Suit No. 1022 of 1957]

Practice and Procedure — Action for damages for breach of contract — Agreement for compromise — Repudiation by defendants — Motion by plaintiffs for judgment and costs — Civil Law Ordinance (Cap 24), s. 3(h) — Jurisdiction.

Advocate and Solicitor — Etiquette — Right of Court to supervise the conduct of its Solicitors — Duty of a Solicitor to conduct litigation with due propriety.

Where a valid compromise in a pending litigation is arrived at between the parties to the suit, the terms of such compromise can be embodied in the judgment and enforced. No separate action, based on the terms of the compromise, is necessary unless the parties merely announce a settlement but do not ask for a Court Order either to enforce the terms of settlement or to stay proceedings.

The Court has a right and duty to supervise the conduct of its Solicitors, and visit with penalties any conduct of a Solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally.

A Solicitor owes a duty to the Court to conduct litigation with due propriety and to assist in promoting in his own sphere the cause of justice. If, therefore, a Solicitor becomes aware in the course of proceedings that his client is obstructing the interest of justice, it is his duty to advise his client as to the conduct which he ought to follow and if the client still persists in his wrong conduct, he should decline to act for him further.

Cases referred to :—

(1) *Myers v. Elman,* (1940) A.C. 282.

(2) *Edwards v. Edwards,* (1958) 2 W.L.R. 956; (1958) 3 All E.R. 179.

(3) *Eden v. Naish,* 7 Ch. D. 781.

(4) *Hakes v. Hodgkins,* unreported.

(5) *Scully v. Dundonald,* 8 Ch. D. 658.

(6) *Green v. Rozen,* (1955) 2 All E.R. 797.

(7) *Graves v. Graves,* 67 L.T. 420.

MOTION.

G. S. Hill for the plaintiffs.

C. H. Smith for the defendants.

The facts and arguments sufficiently appear from the judgment.

Whyatt C.J. : — This motion by the plaintiffs, Yee Chang & Co. Ltd. against the defendants, the Koninklijke Paketvaart Maatschappij, for judgment for the sum of $5,379.21 and costs raises important questions relating to the enforcement of a compromise in a pending suit and to the duty of solicitors, as officers of the Court, to conduct litigation with due propriety.

On the 20th August 1957 the plaintiffs issued a writ against the defendants claiming damages for breach of contract in and about the carriage of bales of rubber by two of their vessels, the S. S. Camphuys and the S. S. Van Riemsdijk. On the 18th December 1957, the plaintiffs delivered a statement of claim in which they quantified their damage at $11,953.80 and on the 11th January 1958 the defendants delivered a defence denying liability for the whole amount of the claim. However on the 6th March 1958, the defendants' solicitors enquired from the plaintiffs' solicitors whether the plaintiffs would be prepared to accept 30% of their claim in settlement, each side paying its own costs. The plaintiffs' solicitors wrote to the defendants' solicitors on the 10th March, stating that